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No. 89-1645

SUPREME COURT, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

MARCUS S. SMITH, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

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1. Respondents spend the bulk of the brief in opposition defending a proposition upon which the court of appeals did not rely. In their view, the court's opinion should be read as holding only that FELRTCA (the Reform Act) "does not deprive [them] of the cause of action against Dr. Marshall provided in the Gonzalez Act." Br. in Opp. 2. But the court's opinion simply does not support such a reading. The court plainly held that by its own terms the Reform Act does not apply to this case. In reaching that conclusion, the court did not rely at all on its separate and independent determination that the Gonzalez Act was also not a bar to this suit.

The relevant portion of the court of appeals' opinion reads as follows (Pet. App. 10a-11a (emphasis added)):

> FELRTCA provides that "[t]he remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim . . ." FELRTCA § 5, 102 Stat. at 4564 (to be codified at 28 U.S.C. § 2679(b)(1)). The foreign country exception to the FTCA exempts the United States from liability on "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). When Congress enacted FELRTCA it did not amend the FTCA's section 2680(k). FELRTCA is part of the FTCA, and thus the foreign country exception of section 2680(k) remains to preclude an action against the United States on a claim arising in a foreign country. The claim in the present case arose in Italy. The Smiths, therefore, have no remedy against the United States. *Because they do not, FELRTCA does not operate to provide Dr. Marshall with immunity.*

The basis for the court's refusal to apply the Reform Act is clear. The court held that "because" an exception to the Federal Tort Claims Act precludes suit against the United States, the Reform Act does not confer immunity on Dr. Marshall. The Gonzalez Act is immaterial to this construction of the Reform Act's text. The Gonzalez Act is also irrelevant to the points with which the court sought to buttress that construction – the Reform Act's legislative history and its application to the TVA (Pet. App. 11a-13a).



Respondents assert that "the court of appeals concluded that the FELRTCA 'did not take away the Smiths' *[Gonzalez Act]* cause of action against Dr. Marshall.'" Br. in Opp. 7 (emphasis added). But respondents' bracketed reference to the Gonzalez Act is a misleading revision of the court's opinion. What the court actually said (referring to passages in the legislative history) was: "These legislative statements support our conclusion that FELRTCA did not take away the Smiths' cause of action against Dr. Marshall." Pet. App. 12a. The court of appeals did not invoke the Gonzalez Act in this portion of its opinion. Indeed, as we demonstrate below, there is no such thing as a "Gonzalez Act cause of action." Respondents' effort to suggest otherwise is an unsuccessful attempt to attribute its position to the court.

The rationale on which the court of appeals did rely – that the Reform Act does not confer immunity because the foreign tort exception bars respondents from suing the United States – would be equally applicable to an action against a federal employee who was sued as a result of his involvement in an automobile accident overseas while on official business. Indeed, as we noted in the petition, nothing in the court's reasoning distinguishes the foreign tort exception to the FTCA from any of the other exceptions in 28 U.S.C. 2680 barring suit against the United States. Pet. 18.[1]

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[1] Respondents appear to concede as much when they argue that – because Congress chose to codify the Reform Act in Chapter 171 of Title 28 of the United States Code (28 U.S.C. 2672-2680) – "the scope of [the Reform Act] is expressly limited by the subsection 2680 exceptions to tort liability of the United

The Ninth Circuit's opinion does not, in our view, leave the district courts in that circuit free to adopt respondents' attempted revision of the panel's holding. Rather, as the Fifth Circuit noted, the decision in this case is "largely in conflict" with decisions applying the

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States." Br. in Opp. 21 n.19; see *id.* at 20-21 (noting that Section 2680 provides that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to" the enumerated exceptions).

Notwithstanding this argument's superficial linguistic appeal, it does not justify restricting the scope of the Reform Act's express immunity and substitution provisions. First, the Reform Act itself, in 28 U.S.C. 2679(d)(4), provides that upon a certification that an individual defendant was acting within the scope of his federal employment, an action against the employee "shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)] and shall be subject to the limitations and *exceptions* applicable to those actions" (emphasis added). The only "exceptions" applicable to actions against the United States under 28 U.S.C. 1346(b) are those categories of claims enumerated in Section 2680 under the heading "Exceptions." Second, the legislative history is crystal clear on this point; "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate." H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988). Third, respondents' interpretation would give rise to absurd results. Although Congress enacted the Reform Act to deal with what it found was an "immediate crisis" arising from the prospect of individual tort actions, respondents' construction would deny the Reform Act any effect in such cases as those involving intentional torts, libel, negligent delivery of mail, and wrongs involving Customs or tax matters.

In any event, respondents' argument goes to the merits of this action and does not affect the suitability of the case for further review.



Reform Act to cases to which the Gonzalez Act does not apply. *Mitchell* v. *Carlson*, 896 F.2d 128, 135 & n.7 (1990). In holding that the Reform Act applied to a suit against an individual federal employee on an assault claim that could not be brought against the United States, the *Mitchell* court addressed the Ninth Circuit's reasoning at length and "decline[d] to follow" it. *Id.* at 135-136. If the Ninth Circuit's decision were as respondents claim, it would have had no potential application to the facts of *Mitchell*.

The petition fairly and accurately describes the Ninth Circuit's interpretation of the Reform Act, the conflict it creates with decisions of other courts of appeals, and its potential for disrupting the scheme that Congress adopted to deal with the problem of suits against individual federal employees. The Ninth Circuit's interpretation of the Reform Act warrants this Court's review.

2. Apart from the fact that respondents' Gonzalez Act argument was not the basis for the court of appeals' judgment, it is also invalid on its merits.[2] Most importantly, that argument rests on a basic mischaracterization of the Gonzalez Act. According to respondents, this statute "recognize[s]," "provide[s]," or makes "cognizable" an action for medical malprac-

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[2] If further review were granted, respondents could present their Gonzalez Act argument as an alternative basis for affirming the judgment. If the Court were to agree with our interpretation of the Reform Act, it could then either reach that argument or remand to allow the court of appeals to consider it in the first instance.

tice against Dr. Marshall. Br. in Opp. i, 2, 8.[3] Thus, respondents contend, they are entitled to prevail unless we can establish that the Reform Act has "deprived" them of, or impliedly repealed, this "Gonzalez Act cause of action" (*id.* at i, 7, 8-14 & n.7). In the same vein, they argue (*id.* at 11 & n.10, 19) that their action against Dr. Marshall is one to which, by its own terms, the Reform Act does not apply because the action has been "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized" (28 U.S.C. 2679(b)(2)). Each of these related arguments is without merit.

The Gonzalez Act, 10 U.S.C. 1089, does not affirmatively authorize the pursuit of any claim against a military physician. To the contrary, with the exception of a narrow category of claims of which this case is an example, the statute *withdraws* whatever right of action an injured plaintiff might otherwise have. Subsection (f) of the Act, on which respondents put particular stress (Br. in Opp. 2, 5-6, 24), does not suggest otherwise. It provides only that the head of an

[3] This conception of the Gonzalez Act pervades all of the arguments in the brief in opposition. See, *e.g.*, Br. in Opp. 11 (suggesting that Gonzalez Act is among the statutes that "authorize actions against individual federal employees"); *id.* at 8 n.6 (referring to "Gonzalez Act remedy"); *id.* at 14-15 (suggesting that claim against a military physician is not a "common law" claim); *id.* at 18 (suggesting that Section 5 of Reform Act does not make an action against the United States the exclusive remedy in this case because that section did not refer to "a remedy against the individual under any other federal statute"); *id.* at 20 (suggesting court of appeals was correct because Congress "envisioned and approved the pursuit of constitutional or federal statutory actions against individual federal employees").



agency employing military physicians "may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for" those physicians assigned to foreign countries. Thus, whatever action a plaintiff may have against such a physician is not created by or derived from the Gonzalez Act. The most that can be said (and then only for some claims) is that the action is not barred.

Because the Gonzalez Act neither creates a cause of action nor confers any right to pursue any claim against an individual military physician, it does not stand in the way of the defense to such claims provided by the Reform Act. There is no need to repeal a statute – the Gonzalez Act – that bars most military medical malpractice claims against physicians and simply authorizes indemnification for the remainder in order to give full effect to a statute – the Reform Act – that duplicates the Gonzalez Act as to some claims and provides additional protection as to others. The two may simply coexist.[4]

[4] It is untenable to suggest, as respondents do (Br. in Opp. 24 n.20), that our position on the Reform Act would prohibit indemnification of physicians for medical malpractice judgments entered in foreign courts. We have never suggested that the Reform Act deprives the Gonzalez Act of all effect, and obviously nothing in the text of the Reform Act prohibits indemnification of physicians or otherwise deprives agencies of their authority to provide indemnification. Similarly, nothing in the Reform Act forecloses the Gonzalez Act's waiver of sovereign immunity for medical malpractice claims framed in terms of assault or battery, 10 U.S.C. 1089(e), or the comparable waivers in other similar statutes, see Br. in Opp. 12-13. The continued effectiveness of provisions like these demonstrates why Congress did not repeal these Acts when it enacted the Reform Act.

Moreover, the Reform Act *expressly* specifies the manner in which a federal statute must operate to create an action maintainable against an individual employee, and the Gonzalez Act does not meet that test. Section 5 of the Reform Act, 28 U.S.C. 2679(b)(2), establishes an exception for actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." Where Congress has prescribed the statutory actions that may continue to be brought against individual employees, it would be inappropriate for a court to refer to rules of construction designed for cases in which Congress has not specified its intention – so as to permit the pursuit of additional actions not meeting the statute's criteria. See *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980).

Of course, there is no sense in which an action against a military physician – even an action not barred by the Gonzalez Act – is either an action for "a violation of" that Act or one "authorized" by the statute.[5]

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By mischaracterizing our position, respondents highlight the fundamental defect in their reliance on the doctrine of implied repeal. They are too quick to invoke that doctrine on the basis of asserted conflicts between the Gonzalez Act and the Reform Act that do not exist. Just as nothing in the Reform Act suggests that military physicians may not enjoy all forms of protection conferred by the Gonzalez Act, nothing in the Gonzalez Act suggests that the Reform Act should not confer the same immunity on military physicians that it confers on all other federal employees.

[5] The House committee report on the Reform Act confirms the clear import of this language. It explained that the purpose of 28 U.S.C. 2679(b)(2) was to make clear (H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988))

> that the changes made by this Act do not alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as: *Cort* v. *Ash*, 422 U.S. 66 (1975); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc.* v. *Lewis*, 444 U.S. 11 (1979).

Respondents have no such right of action under the Gonzalez Act.



The Gonzalez Act does not establish any legal duties that may be violated and does not provide any remedies in those suits to which it applies. Whatever cause of action a plaintiff may have against a military physician is derived exclusively from the common law or other sources of civil liability.

3. Congress's decision to confer immunity on individual employees in cases in which an action against the United States is barred may operate to leave an injured person without the right to sue in tort (although, in cases like this, an administrative remedy is potentially available).[6] But when it enacted the Reform Act, Congress made a deliberate choice with full awareness of the consequences. The House committee report on the Act explained (H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988)):

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the

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[6] See Military Claims Act, 10 U.S.C. 2731 *et seq.* We are advised that respondents filed a claim under this statute, but failed to comply with the relevant statute of limitations.

> scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate.
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For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

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